(16,637.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 142.

ROBERT G. WILSON, PLAINTIFF IN ERROR,

vs.

EUREKA CITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a In the Supreme Court of the State of Utah.

EUREKA CITY, Respondent,
v.
R. G. WILSON, Appellant.

Transcript on Appeal.

Filed January 2, 1897.

LILBURN P. PALMER,
Clerk of Supreme Court of Utah.

1 TERRITORY OF UTAH,
County of Juab, Eureka City, } ss:

In the City Justice's Court, Eureka City.

Before Martin Igoe, city justice of the peace *pro tem.*

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

Be it remembered that on this 15th day of May, A. D. 1895, before me, Martin Igoe, city justice of the peace *pro tem.*, city and county aforesaid, personally appeared Gus. J. Heinroid, who was by me sworn in due form of law, and who on his oath did say that R. G. Wilson, on the 14th day of May, 1895, at Eureka city, county of Juab, Territory of Utah, did wilfully, knowingly, and unlawfully move a certain frame building into and upon one of the public streets of said Eureka city, to wit, the county road of Juab county, running through said Eureka city and commonly known as Main street, and did thereby obstruct the free passage of said street and road, said R. G. Wilson not having from the mayor or president of the city council, or any councilor of the common council of said Eureka city, written or any permission to move said frame building into or upon said street, contrary to section 12, ordinance No. 10, Ordinances of Eureka City, Juab County, Utah Territory, entitled "An ordinance adopting the county court survey of streets and naming of same, and providing against the obstruction of streets," passed and approved January 3rd, 1893, in such cases made and provided and against the peace and dignity of the people of Eureka city.

GUS. J. HENROID.

Subscribed and sworn to before me this 15th day of May, 1895.

MARTIN IGOE,
City Justice of the Peace pro Tem.

2 Endorsed: City justice's court. Amended complaint. The People of Eureka City *v.* R. G. Wilson, def't. Filed — 15th,

1895, as amended complaint. Martin Igoe, justice of the peace *pro tem.* No. 3638. Filed in the district court at Provo City, Utah, May 27th, 1895. —— ——, clerk.

STATE OF UTAH, }
County of Juab. }

I, Wm. Button, clerk of the fifth judicial district court in and for Juab county, do hereby certify that the foregoing is a full, true, and correct copy of the amended complaint in the above-entitled action, now on file in my office.

Witness my hand and the seal of said court this 30th day of December, 1896.

WM. BUTTON, *Clerk,*
By T. L. FOOTE,
Deputy Clerk.

[SEAL.]

3 Title of Court and Cause.

Charged with obstructing Main street, in said Eureka. Complaint made by one Gus. J. Henroid, city marshal. Plead not guilty. Judgment, fined $25.00 and costs, taxed at $20.00.

Be it remembered on the 15th day of May, 1895, Gus. J. Henroid filed a complaint accusing R. G. Wilson of the crime of obstructing the street in Eureka city, Juab county, Utah Territory, in violation of section 12 of ordinance No. 10 of the common council of Eureka city aforesaid, approved January 3rd, 1893, and the defendant, having been arrested and brought into court and having had said complaint read and being required to plead thereto, plead not guilty; trial had with jury the 16th day of May, 1895, by jury, with verdict of guilty; and thereupon the court found the defendant guilty and fined the defendant the sum of $25.00 and costs, taxed at $35.60, and ordered and entered judgment against said defendant for the sum of $25.00 and costs, taxed at $35.60; and thereupon defendants files notice, affidavit, and undertaking for appeal, and, the undertaking being approved, appeal is hereby ordered.

JOHN S. WATTS,
City Justice.

I, John S. Watts, hereby certify that I am the duly elected and qualified acting city justice for Eureka city, Juab county, Utah Territory, and that the transcript herein is a true and correct statement, as shown by my docket now in my possession.

JOHN S. WATTS,
City Justice of the Peace.

Judgment entered on the 16th day of May, 1895.

4 Endorsed: "Transcript from city docket. 3638. Filed in the district court at Provo City, Utah, June 3, 1895. —— ——, clerk."

STATE OF UTAH, }
County of Juab, } ss:

I, William Burton, clerk of the fifth judicial district court in and for Juab county, Utah, do hereby certify that the foregoing is a full, true, and correct copy of the transcript from city docket in the above-entitled action now on file in my office.

Witness my hand and the seal of said court this 30th day of December, 1896.

[SEAL.] WILLIAM BURTON, *Clerk,*
By T. L. FOOTE, *Deputy Clerk.*

5 In the District Court of the First Judicial District of the Territory of Utah.

EUREKA CITY, Plaintiff, }
v.
R. G. WILSON, Defendant. }

On appeal from the city justice's court of Eureka city, Juab county, Utah Territory.

Comes now the defendant in the above-entitled cause and, by leave of court first had and obtained, withdraws his former plea of "Not guilty" to the complaint herein and demurs to said complaint, and for cause of demurrer alleges—

That said complaint does not state facts sufficient to constitute an offense.

J. W. N. WHITECOTTON,
Attorney for Defendant.

Endorsed: "3638. Eureka City *v.* R. G. Wilson. Demurrer. Filed in the district court at Provo City, Utah, Oct. 5, 1895. George Havercamp, clerk, by R. B. Thurman, deputy. J. W. N. Whitecotton, att'y for def't."

STATE OF UTAH, }
County of Juab, } ss:

I, William Burton, clerk of the fifth judicial district court in and for Juab county, Utah, do hereby certify that the foregoing is a full, true, and correct copy of the demurrer in the above-entitled action now on file in my office.

Witness my hand and the seal of said court this 30th day of December, 1896.

WM. BURTON, *Clerk.*
By T. L. FOOTE,
Deputy Clerk.

6 First District Court Minutes, Utah, September Term, 1895—Monday, the Ninth Day of September, 1895.

EUREKA CITY
v.
R. G. WILSON.

The hearing of this cause is reset for Sept. 19, 1895.

First District Court Minutes, Utah, September Term, 1895—Thursday, the 19th Day of September, 1895.

The following cases were reset for trial as follows, to wit:
Eureka City *v.* R. G. Wilson, September 26th, 1895.

First District Court Minutes, Utah, September Term, 1895—Friday, the 27th Day of September, 1895.

The following cases were reset for trial as follows, to wit:
Eureka City *v.* R. G. Wilson, Oct. 2d, 1895.

STATE OF UTAH,
County of Utah, } *ss:*

I, E. L. Jones, clerk of the fourth judicial district court in and for Utah county, State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the minute entries in the above-entitled action as the same appears of record in Minute Book 7 of the First District Court Minutes for Utah Territory now on file in my office, at Provo City, Utah.

Witness my hand and the seal of the fourth judicial district court, at my office, in Provo City, Utah, this 2nd day of November, A. D. 1895.

[SEAL.]

E. L. JONES, *Clerk,*
By R. E. KNOWLDEN,
Deputy Clerk.

7 First District Court Minutes, Utah Co., Utah, September Term, 1897—Monday, the 19 Day of October, 1896.

EUREKA CITY
v.
R. G. WILSON.

In this cause the motion of plaintiff for transfer of this cause to the fifth judicial district court, sitting at Nephi, in Juab county, coming on to be heard, after hearing the statements of counsel for plaintiff, and it satisfactorily appearing to this court that said cause is properly triable in said fifth judicial district, in the county of Juab, therefore ordered that the files, matters, and proceedings in this cause be by the clerk of this court forwarded to the clerk of the fifth judicial district court sitting at Nephi, in said county, State of Utah.

STATE OF UTAH, }
County of Utah, } ss:

I, E. L. Jones, clerk of the fourth judicial district court in and for Utah county, State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the original order in the above-entitled cause of record and now on file in my office, at Provo City, Utah.

Witness my hand and the seal of said court, at my office, in Provo City, Utah county, Utah, this 20th day of October, A. D. 1896.

[SEAL.]

E. L. JONES, *Clerk,*
By R. E. KNOWLDEN,
Deputy Clerk.

8 Fifth District Court Minutes, Juab County, Utah, October Term, 1896—Saturday, October 24th, 1896. Minute Book "A," page 53.

In the Fifth Judicial District Court of the State of Utah, County of Juab.

EUREKA CITY }
v.
R. G. WILSON. }

This cause came on regularly for hearing, the defendant being present in person with his counsel, J. W. N. Whitecotton, and B. N. C. Scott and George Sutherland appearing as counsel for plaintiff. Both parties, in open court, expressly waive a jury and expressly consent that the same should be tried by the court sitting without a jury. Thereafter evidence was introduced and the cause submitted for the decision of the court, and the court, being sufficiently advised, finds the defendant guilty as charged in the complaint; the defendant thereupon expressly waived time for passing judgment and consent that judgment might be pronounced at once. The court thereupon sentenced the defendant, R. G. Wilson, to pay a fine of $10.00.

Defendant asked for 30 days in which to prepare and file a statement on appeal, also a stay of execution for the same period of time.

It is so ordered by the court.

STATE OF UTAH, }
County of Juab, } ss:

I, William Burton, clerk of the fifth judicial district court in and for Juab county, State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the minutes of the trial of the above-entitled cause, as appears of record in my office.

Witness my hand and the seal of said court this 29th day of December, 1896.

[SEAL.]

WM. BURTON, *Clerk,*
By T. L. FOOTE,
Deputy Clerk.

9 In the District Court of the Fifth Judicial District of the State of Utah in and for Juab County.

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

This case was commenced by complaint filed in the city justice's court of Eureka city, Utah, on the 15th day of May, 1895. The case was tried, the defendant convicted and adjudged to pay a fine of $25.00 and the costs of the prosecution, from which judgment the defendant appealed to the district court of the first judicial district of the Territory of Utah. In that court the defendant was allowed to withdraw his plea of not guilty and demur to the complaint on the grounds that the complaint did not state facts sufficient to constitute a public offense. This demurrer was by the court overruled on the 5th day of October, 1895; to which the defendant duly excepted.

On the advent of statehood the cause was regularly transferred to the fifth district court for Juab county. The cause came on for trial on the 24th day of October, 1896, both parties in open court expressly waived a jury, and the case was tried before the court, sitting without a jury, and the following proceedings were had:

The defendant objected to the introduction of any testi-
10 mony in the case, on the ground that the complaint does not state facts sufficient to constitute a public offence. Objection overruled; to which the defendant excepted. Section 12 of ordinance number 10 of Eureka city was offered and received in evidence and is as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

To the admission of this section of the ordinance the defendant objected, on the ground that it is immaterial and incompetent, for the reason that the ordinance shows upon its face that it is void; that it is in contravention of section 1 of article XIV of amendments to the Constitution of the United States; that it is void for the further reason that it vests in an individual—the mayor or the president of the city council, or in their absence a member of the city council—an irresponsible and uncontrolled discretion, and delegates or attempts to delegate to such officer or officers a power which the city council has no authority to delegate or exercise. Defendant's objection the court overruled; to which defendant duly excepted.

The following ordinance was also admitted over defendant's objection, to which he duly excepted, to wit:

"An ordinance establishing a fire limit within Eureka city and defining the limits thereof; providing that no wooden building shall be erected within said limits except by permission of the commission on building within the fire limits of said city,
11 and providing for the alteration and repair of wooden buildings already erected."

SECTION 1. That the following boundaries are hereby established as the fire limits of Eureka city, to wit: Commencing at a point on Main street of said city, where said street crosses the Union Pacific Railway track, and opposite or nearly opposite, the Keystone hoisting works, thence running in an easterly direction along said Main street to a point where said street intersects the road or street easterly of the site now occupied by the M. E. Church building; the northerly and southerly boundaries of said fire limits to be two hundred feet on each side of said Main street for said distance.

SECTION 2. Every building hereafter within the fire limits of said city shall be of brick, stone, iron, or other substantial and incombustible material, and only the following wooden buildings shall be allowed to be erected, except as hereinafter provided, viz: Sheds to facilitate the erection of authorized buildings, coal sheds not exceeding ten feet in height, and not to exceed one hundred feet in area, and privies not to exceed thirty feet in area and ten feet in height, and all such sheds and privies shall be separate structures; provided that any person desiring to erect a building of other material than those above specified within said fire limits, shall first apply to the committee on building within said fire limits of the city for permission so to do, and if the consent of the committee on building within said fire limits shall be given, they shall issue a permit, and it shall thereupon be lawful to erect such building under such regulations and restrictions as the committee on building within said fire limits may provide.

12 SECTION 3. Any wooden building already within said fire limits shall only be altered or repaired in such a manner that neither area nor height be increased without the consent of the said committee on building within said fire limits.

SECTION 4. The said committee on building within said fire limits shall have the power to stop the construction of any building, or the making of alterations or repairs on any building where the same is being done in violation of the provisions of this ordinance, and any owner, architect, or builder, or others who may be employed, who shall assist in violation of non-compliance with the provisions of this ordinance shall be subject to a fine for every such violation or non-compliance, of not less than ten nor more than one hundred dollars.

SECTION 5. That there shall be a committee consisting of three members of the council appointed by the mayor and confirmed by the council, to be known as the "committee on building within the fire limits of Eureka city," and that said committee be appointed immediately upon the taking effect of this ordinance.

SECTION 6. This ordinance shall take effect and be in force from and after its first publication in the Tintic Miner.

Passed and approved June 4, 1894.

Attest: JOHN McCHRYSTAL, *Mayor.*

The evidence further showed that on the 15th day of May, 1895, the defendant was the owner and in the control of a certain frame building constructed of lumber and shingles, 20 feet long, 16 feet wide, and 10 feet high to the ceiling, which prior to and at the time it was being moved was occupied as a dwelling-house.

That the defendant applied to the mayor of Eureka city,
13 John McChrystal, for permission to remove this building along and across Main street, which is a principal street in Eureka city; that he stated to the mayor at that time that he desired to remove it from where it was, which was within the fire limits at that time, to another point within the fire limits of Eureka city as defined by the ordinances. The building had been constructed prior to the time of the enactment of the ordinance establishing fire limits and prior to any fire limits being established in Eureka city. The mayor refused to grant permission to move the building, stating that if the defendant desired to remove the building outside of the fire limits he would grant permission to do so, but would not grant permission to move the building along or across said Main street within the fire limits of the city. The distance from the point where the building stood to the point where he desired to move it is 206 feet, along and across Main street. At the point where the building stood originally the street is fifty feet wide from the front of the buildings on the one side to the front of the buildings on the other side, part of that width being occupied by sidewalks on either side of the street and the balance by the travelled highway; that the defendant, immediately after the permission of the mayor was refused him, moved the building from its position into the street with block and tackle, with rollers placed under the building; that the time occupied in moving the building altogether was from eleven o'clock a. m. till 3 or 4 p. m.

That Eureka city is a mining town and was at that time, having a population of about two thousand; that along the street where this building was moved there were business houses or buildings close together upon both sides. The building came upon the street
diagonally, and after it had been gotten upon the street it
14 was moved along by means of a block and tackle and ropes put around a steel bar driven into the street, which was driven in one place in the street. It was admitted by the prosecution that the building was moved by the defendant with reasonable diligence.

At the close of the testimony the defendant moved the court to discharge him on the ground that the facts proved did not show that any offense had been committed, and that the ordinance under which the prosecution is made is invalid; which motion the court overruled; to which ruling the defendant excepted.

The court thereupon found the defendant guilty as charged in the complaint.

The defendant, then being present in court, waiving time for sentence, and being called for sentence, thereupon moved the court to vacate and set aside its decision and to grant a new trial of the cause on the following grounds:

1. That the decision is contrary to the evidence.
2. That the decision of the court is against law.
3. Errors of law occurring at the trial and excepted to by the defendant.

Which motion the court overruled; to which ruling the defendant duly excepted.

The court then proceeded to and did pass sentence upon the defendant that he pay a fine in the sum of ten dollars and costs of the said justice's court and of the said district court.

15 *Specification of Particulars in which the Decision of the Court is Contrary to the Evidence.*

1. The evidence all shows that the defendant was using the street in question for a lawful purpose.
2. The evidence shows that the defendant had done all that was required of him to get permission to use the street, to wit, had requested it of the mayor.
3. The evidence shows that the defendant used reasonable diligence in moving the building, so that the street was not unnecessarily obstructed.
4. The evidence shows that there was no objection made by the mayor to the defendant's using the street, but that he objected only to the destination of the building.
5. The evidence shows that the action of the mayor was such an arbitrary use of power that the defendant was not bound to regard his refusal of permission.

Specifications of Particulars in which said Decision is against Law.

The ordinance No. 10, section 12, upon which the prosecution is based is invalid and cannot support a verdict of guilty nor a judgment thereon for the following reasons:

a. It seeks to delegate to and vest in a single individual, to wit, the mayor or *or* the president of the city council or a single member of the council, a power which can only be exercised by the council itself.

b. The said section of said ordinance is in contravention of section 1 of article XIV of the amendments to the Constitution of the United States.

16 *Specifications of Errors Occurring at the Trial and Excepted to by the Defendant.*

1. The court erred in overruling defendant's demurrer to the complaint.
2. The court erred in overruling defendant's objection to the introduction of any testimony in the case.
3. The court erred in admitting in evidence section 12 of ordinance number 10 of Eureka city, as set out on pages 1 and 2 of this bill of exceptions.
4. The court erred in admitting in evidence ordinance No. 16 of Eureka city, relating to the establishing of fire limits, as set out in this bill of exceptions, pp. 2, 3, and 4.
5. The court erred in overruling defendant's motion to discharge him at the conclusion of the testimony.
6. The court erred in overruling defendant's motion for a new trial.

The foregoing is defendant's bill of exceptions, to be used upon the appeal of the above-entitled cause to the supreme court of the State of Utah.

Dated this 7th day of November, 1896.

J. W. N. WHITECOTTON,
Attorney for Defendant.

Due service admitted this 7th day of November, 1896.

B. N. C. SCOTT,
WILLIAMS, VAN COTT AND SUTHERLAND,
Attorneys for Plaintiff.

It is hereby stipulated that the foregoing bill of exceptions is correct and may now be settled and allowed.

B. N. C. SCOTT,
WILLIAMS, VAN COTT AND SUTH-RLAND,
Attorneys for Plaintiff.

Dated November 10, 1896.

The foregoing bill of exceptions is hereby settled and allowed November 12th, 1896.

E. V. HIGGINS, *Judge.*

17 In the District Court of the Fifth Judicial District of the State of Utah in and for Juab County.

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

To Eureka City, the plaintiff above named, and to B. N. C. Scott and Williams, Van Cott and Sutherland, attorneys for said plaintiff, and to William Burton, clerk of said court:

You will take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of the State of Utah from the order of the said district court of the fifth judicial district overruling defendant's motion for a new trial of said cause and from the judgment of said court in imposing upon the defendant a fine of ten dollars and costs of prosecution in said cause.

Dated December 21, 1896.

J. W. N. WHITECOTTON,
Attorney for Defendant.

Endorsed: Fifth district court, Juab county, Utah. Notice of appeal. Filed Dec. 21, 1896. Wm. Burton, clerk, by T. L. Foote, deputy clerk.

STATE OF UTAH, } ss:
County of Juab, }

I, William Burton, clerk of the fifth judicial district court in and for Juab county, Utah, do hereby certify that the foregoing is a full, true, and correct copy of the notice of appeal in the above-entitled action, now on file in my office.

Witness my hand and seal of said court this 29th day of December, 1896.

WM. BURTON, *Clerk.*
T. L. FOOTE,
Deputy Clerk.

18 In the District Court of the Fifth Judicial District of the State of Utah in and for Juab County.

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

In this cause there is, in my opinion, probable cause for an appeal to the supreme court of the State of Utah.

Dated this 21st day of December, 1896.

E. V. HIGGINS, *Judge.*

19 In the Supreme Court of the State of Utah, Regular January Term, January 19, 1897.

EUREKA CITY, Respondent,
v.
R. G. WILSON, Appellant.

This cause, coming on regularly to be heard, was argued by Mr. J. W. N. Whitecotton in behalf of the appellant, by George Sutherland in reply, was submitted and by the court taken under advisement.

Title of Court and Cause.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the lower court be, and the same is hereby, affirmed with costs.

20 In the Supreme Court of the State of Utah.

EUREKA CITY, Respondent,
v.
R. G. WILSON, Appellant.

BARTCH, *J.*:

The defendant in this case was originally prosecuted before a justice of the peace, under a municipal ordinance of Eureka city, for the offense of obstructing the free passage of Main street, in said city, by moving into and upon the street a frame building, without having obtained permission as provided by the ordinances.

Upon conviction he appealed to the district court, and, after conviction there and sentence to pay a fine, to this court.

The first question which we will consider is whether we have jurisdiction, on appeal, in a case like this, where the first appeal was from the judgment of a justice of the peace, and where the validity of a city ordinance and not of a statute is assailed.

Counsel for the respondent insist that the decision of the district court in such a case is final and not subject to review here. In support of this contention they cite section 9 of article 8 of the
21 constitution; which section, so far as material here, provides as follows:

"Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district court on such appeals shall be final, except in cases involving the validity or constitutionality of a statute."

This provision grants an appeal from the final judgment of justices of the peace to the district courts, and declares that the decision of those courts on such appeals shall be final, except in cases where the validity or constitutionality of a statute is involved.

The effect of the exception is to allow an appeal to this court in

every case which originates in a justice's court and in which the validity or constitutionality of a statute is drawn in question, made an issue, and decided by the district court on appeal. In all other cases brought before justices of the peace and transferred to the district courts by appeal the final judgment of these courts is conclusive. But does the exception include a case, so brought and transferred, where the validity or constitutionality of a city ordinance was litigated and decided by the district court? We are of the opinion that it does, for, while an ordinance is an enactment of a municipal government and its application is local, still, when valid, it has the force and effect in favor of the municipality and against persons bound thereby of a legislative enactment, and acts done in contravention thereof become unlawful, the same as when done in contravention of a statute.

An ordinance, which can only be passed in pursuance of some legislative enactment, may, like a statute, effect property
22 rights and individual liberty, and the framers of the constitution evidently intended by the use of the word "statute" to include "ordinance," and that the appellate court should have power to determine the validity of any law, whether of local or general application, and whether enacted directly by the law-making power or by a municipality through a delegation of power by the legislature.

While the law-making power of the State is vested in the legislature, yet it is competent for the legislature to delegate power to municipal corporations to pass ordinances which shall have the same force, within the municipality, as a statute, to control its municipal affairs; hence, reasons which exist for the review of statutes by appeal exist for the review of ordinances.

1 Dillon on Mun. Corporations, sec. 308.
18 Am. and Eng. Ency. of Law, 747.
City of Detroit *v.* Railway Co., 95 Mich., 456.
Roderick *v.* Whitson, 51 Hun., 620.
Ex parte Christenson, 85 Cal., 208.

Having concluded that we have jurisdiction to review the question of the validity or constitutionality of an ordinance in a case like the one at bar, it becomes important to inquire whether it is the duty of this court, in this class of cases, to determine questions presented in the record other than those relating to such validity or constitutionality of an ordinance or statute. Counsel for the appellant insists that this court, on appeal, in this class of cases, is not limited to questions of the validity of a statute, but has power to review all the questions presented. We do not agree with counsel as to this proposition, because such does not appear to be the meaning and intention manifested from the provisions of the constitution already quoted, especially when viewed in the light of the
23 history of the former practice in the late Territory of Utah.

Under the territorial form of government, appeals were allowed from all final decisions of the district courts to the supreme court and questions of both law and fact were reviewed, and whether

a case was originally brought before a justice of the peace or in the district court was immaterial.

1 C. L. U., 1888, page 57.

This practice made it possible to appeal any case no matter how insignificant the amount of the judgment or how totally without merit the appeal or the cause of the appellant. It had a tendency to encourage profitless litigation and consume the time of the appellate court without just cause. Such practice was in vogue when the constitution was framed, and we must assume that the framers of that instrument were familiar with current history and that they had knowledge of the practice and its effect.

When, therefore, contrary to the former practice, the framers of the constitution provided that "the decision of the district courts" on appeals from judgments of justices of the peace "shall be final, except in cases involving the validity or constitutionality of a statute," their evident object and intention were to obviate the evil to which the practice then existing was subject, and yet provide a way by which statutory and constitutional questions which might arise in such cases could be reviewed by the appellate court. This object could be but imperfectly attained if, when this court assumed jurisdiction of such a case, it would not only determine the statutory or constitutional question, but also inquire into and determine every other question raised during the progress of the trial.

24 In effect, this would restore the former practice, against the express provision of the constitution, because it would render it possible to bring every such case here for re-examination. All that would be necessary would be to raise *so* some statutory or constitutional question, whether material to the decision of the case or not, and the right of appeal and re-examination of the case would be assured. Clearly no such result was intended, nor is it manifest from the language employed in the provision above quoted; nor can it be made possible by judicial interpretation, without violating familiar rules of construction.

In harmony with the plain meaning and intent of the constitution, we hold: 1. That it is essential to the jurisdiction of this court over judgments of the district courts in cases which originated in and were appealed from justices of the peace that it shall appear that a statutory question was raised and presented to a district court.

2. That such question was decided by the district court, or that its decision was necessary to the judgment rendered in the case.

3. That if these things appear, then this court has jurisdiction and must examine the judgment so far as to enable it to determine whether the statutory question and claim of right were correctly adjudged, and, if they were, the judgment must be affirmed.

4. That if the statutory question was erroneously decided, then this court must further inquire whether, notwithstanding the error in deciding that question, there was any other matter or issue not affected by the statutory question decided, which in itself is sufficient to sustain the judgment, and if such be the case, then the judg-

ment must be affirmed, without determining whether the ad-
25 judication on such other matter or issue be correct.

5. That if it be found that the statutory question is of such force as to render a correct decision thereof necessary to a final adjudication, or that there has been no decision of any other matter or issue not affected by the statutory question sufficient to sustain the judgment of the district court, then this court will reverse the judgment and direct a proper judgment to be entered or remand the cause, as may be required by the circumstances of each particular case.

The application of these principles to the class of cases here under consideration is clearly authorized by the language and spirit of the constitutional provision mentioned.

Murdock *v.* City of Memphis, 20 Wall., 590.

The remaining question necessary to be considered in this case is the one relating to the validity of section 12 of ordinance No. 10 of Eureka city, under which the appellant was convicted. That section reads as follows: "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares, of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction subject the offender to a fine of not to exceed twenty-five dollars."

The appellant contends that this is unconstitutional and void, and claims that it is unreasonable and deprives the citizen of a lawful use of a public highway; that it vests in the mayor, or, in his absence, the president or member of the council, an absolute and arbitrary discretion, and delegates to an individual the power which was conferred upon the council, and that it contravenes section 1, article 14, of the amendments to the Constitution of the
26 United States, in that — deprives the citizen of his property without due process of law and denies to him the equal protection of the law. We do not concur in this contention.

The ordinance in question was passed in pursuance of section 1755, C. L. U., 1888, which, among other things, confers power upon the city council "to regulate the use of streets, alleys, avenues," etc., subd. 10; "to prevent and remove obstructions and encroachments upon the same," subd. 11; "to prevent and remove obstructions to any street, avenue, alley," etc., subd. 22.

The city council is thus clothed with power not only to regulate the use of streets, but also to prevent the placing of obstructions upon them. Upon examination of section 12 of the ordinance, it cannot successfully be maintained that its provisions are unreasonable, or that it deprives any citizen of the lawful use of the street, or that it authorizes an improper or unlawful exercise of power or an unjust discrimination, but, on the contrary, its provisions are a substantial compliance with the statute. It is true there is a discretion vested in an officer, but such discretion does not mean an absolute or arbitrary power. It is a legal discretion which must be exercised in a

reasonable manner. Where the law leaves the exercise of a power to the discretion of an officer, it does not mean that he shall exercise such discretion wantonly or arbitrarily, to the injury of any subject. Such officer is responsible for an abuse of the power. The authority or power is not his. He is simply the agent of the law for a lawful purpose and must exercise his discretion fairly, reasonably, and honestly, and is answerable as such for a prostitution of the power so vested in him.

State *v.* Yopp, 2 Am. St. Rep., 305.
White *v.* Kent, 11 Ohio St., 550.
Hamer *v.* Weber County, 11 Utah, 16, 22, 23.

27 In the case at bar the creation of the discretion implies that there may be times and occasions when the moving of a building upon the street might be permitted with safety to property and without any unreasonable interference with the ordinary modes of travel. This, however, is not an ordinary or a usual use of the street, and the appellant could not claim the privilege to so use it, as matter of right. The principal design of a highway is to accommodate public travel in the usual and ordinary mode, and this is so at common law, but it may lawfully be used for other purposes, where the occasion and circumstances permit of such use without an unreasonable interference of the free passage over it of those who are traveling upon it in the usual manner. Just when an unusual or extraordinary use of the highway ought to be permitted is, doubtless, in many instances difficult to determine, especially is this so in cities and towns where the population is dense and the amount of travel great. It would seem impossible to lay down any general rule as to when such use should be allowed, because no such rule could be established which would meet the emergencies of individual cases. Very much must depend upon the locality, the width of the street, the injury, if any, it will be likely to cause to other property, the time when such use of the highway is to be made, and the obstruction it will offer to ordinary travel. No human foresight could, with any degree of accuracy, determine and schedule the occasions and circumstances which would entitle a citizen to use a highway in an extraordinary manner by moving a building into and upon the same. Such being the case, a city council, which has power by statute to regulate the use of the streets and prevent obstructions being placed upon them, may by ordinance prohibit the moving of buildings thereon without the written per-
28 mission of the mayor or other officer or committee of its members, and such power is not legislative, but simply administrative, and renders the prohibition conditional instead of absolute, the use of the highway for such unusual purpose being subject to a contingency, to be declared upon by the agent of the law.

It is doubtless within the power of the city council of Eureka city to entirely prohibit the moving of buildings upon its streets, and where a municipal corporation may prohibit a thing altogether it may prohibit it conditionally, and confer upon some officer or officers power to determine whether a fact or state of things exist which

will authorize the doing of it. In many cases it is difficult to determine whether there has been an unwarranted delegation of discretionary power to an officer, but a delegation of power similar in character to that conferred in the section of the ordinance under consideration has frequently been upheld by the courts, and the views here expressed have the support of authority.

Elliott on Roads and Streets, 578, note 2.
In re Flaherty, 105 Cal., 558.
Day *v.* Green, 4 Cush., 433.
Williams *v.* Citizens' Railway Co., 130 Ind., 71.
Commonwealth *v.* Parks, 155 Mass., 531.
Ex parte Fiske, 72 Cal., 125.
Graves *v.* Shattuck, 69 Am. Dec., 536.
Commonwealth *v.* Davis, 162 Mass., 510.
Pedrick *v.* Bailey, 12 Gray, 161.
Quincy *v.* Kennard, 151 Mass., 563.
People *ex rel. v.* Mullholland, 82 N. Y., 324.
Moers *v.* City of Reading, 21 Pa. St., 188.
Locke's Appeal, 72 Pa. St., 491.
Dowling *v.* Lancashire Ins. Co., 31 L. R. A., 112.
Commonwealth *v.* Ellis, 158 Mass., 555.
Blanding *v.* Burr, 13 Cal., 343.
Lowell *v.* Simpson, 10 Allen, 88.

Nor does section 12 of the ordinance deprive the citizen of his "property without due process of law" or deny to him "the equal protection of the laws," in violation of the 14th amendment
29 of the Constitution of the United States. The provisions of the amendment above referred to undoubtedly mean that there shall be no arbitrary spoliation of property or arbitrary deprivation of individual rights, but that every person shall be afforded equal security and protection with every other person under like circumstances in the enjoyment of his rights of person and property; that all shall have like access to the courts for the protection and enforcement of their personal and civil rights and the redress and prevention of wrongs, and that legislation shall treat alike all persons subject to it, and not interpose an impediment to the business or pursuits of one except as applied to the same business or pursuits of all others under like circumstances. These provisions of the amendment, however, were not designed to interfere with the police power of the State, and while the extent of this power does not appear to have yet been defined with precision, and while practically it would seem impossible to so define it because of the great variety of conditions and circumstances which govern its application, still there can exist no doubt that under such power the State may prescribe regulations to promote the health, peace, education, morals, and good order of the people, and, this being true, it may of necessity by legislation regulate through its agents, with as little inconvenience to the individual as possible, the use of the highways, because such regulations is conducive to the good order of the general public. Especially is this the case as to populous cities

and towns. Laws of this character enacted under the police power of the State are not intended to impose an unnecessary or unusual restriction upon any person or to unjustly discriminate between citizens, but to promote the general good with the least possible inconvenience to the individual.

30 Examining the provisions of the section of the ordinance under consideration, we do not perceive that they contravene any of the principles stated, nor do they authorize any unjust discrimination between citizens in the use of the highway. They apply to all alike under like circumstances and are necessary to the good order of Eureka city, the peace, welfare, and comfort of its inhabitants, simply forbidding an unusual and extraordinary use of the highway by any citizen without first having obtained permission for such use from an officer. There is no attempt to interfere with the usual and ordinary use of the highway, but it is made unlawful for any person to so use his own property as to materially injure the personal rights and property of others. This is in entire harmony with the maxim *Sic utere tuo ut non alienum laedas.*

That a person has the right to move a building into and upon the streets of a city thronged, as they frequently are, with people without any restraint or control is a proposition both unsound and unreasonable. No such right exists at common law, nor is the denial thereof a violation of any statutory or constitutional law.

Barbier *v.* Connolly, 113 U. S., 27.
Crowley *v.* Christiansen, 137 U. S., 86.
Railroad Co. *v.* Richmond, 96 U. S., 521.
Manufacturing Co. *v.* Beckwith, 129 U. S., 26.

The case of Yick Wo *v.* Hopkins, 118 U. S., 356, cited by counsel for the appellant, was one of race discrimination and is not in point here.

The cases relied on by the appellant for a reversal on the ground that the ordinance in question is invalid cannot be regarded as controlling authority in the case at bar. They are principally cases where by ordinance it was attempted to interfere with abso-

31 lute rights of persons and property and with the doing of a thing which might lawfully be done.

As we have seen, such is not the case at bar. We do not deem it important to discuss any other question presented in the record.

The appellant moved his house into and upon Main street, one of the principal streets of Eureka city, without permission, as provided by ordinance, and thereby committed an unlawful act which rendered him liable to the punishment inflicted.

The judgment is affirmed.

We concur.

ZANE, *C. J.*
MINER, *H.*

32 UNITED STATES OF AMERICA, *ss:*

To Eureka City, a municipal corporation, and to Messrs. Williams, Van Cott & Sutherland, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, wherein Robert G. Wilson is plaintiff in error and said Eureka City, a municipal corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of the State of Utah, this 16th day of June, A. D. 1897.

CHARLES S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

Attest: LILBURN P. PALMER,
Clerk Supreme Court of Utah.

[Seal Supreme Court, State of Utah., Jan. 4, 1896.]

A copy of the foregoing citation was served on us this 16th day of June, A. D. 1897.

WILLIAMS, VAN COTT & SUTHERLAND,
Attorneys for Eureka City, Defendant in Error.

33 In the Supreme Court of the United States.

ROBERT G. WILSON, Defendant and Plaintiff in Error, *vs.* EUREKA CITY, a Municipal Corporation, Plaintiff and Defendant in Error.	Petition for Writ of Error.

And now comes Robert G. Wilson, the plaintiff herein, and respectfully shows to this honorable court:

I. That on the 15th day of May, 1895, a sworn complaint was filed in the justice's court of Eureka city, Utah, charging this plaintiff with the offence of moving a wooden building into and upon a public street of said Eureka city without having the written or any permission from the mayor or president of the city council, or any councilor, so to do, in violation of a certain ordinance of said city which provided as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares, of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence, a councilor. A violation of this section shall on conviction subject the offender to a fine of not to exceed twenty-five dollars."

A warrant thereupon duly issued, and this plaintiff, defendant there, was arrested, brought before said justice's court, pleaded not guilty, was tried, found guilty, and adjudged to pay a fine of twenty-five dollars.

From this judgment the plaintiff herein appealed to the district court of the first judicial district of the Territory of Utah,
34 and was afterwards, to wit, on the 19th day of October, 1896, tried in the fifth district court of the State of Utah, found guilty, and adjudged to pay a fine of ten dollars and the costs of prosecution. From this judgment this plaintiff duly appealed to the supreme court of the State of Utah, assigning, among other grounds for reversal of said judgment, that the ordinance under which he was prosecuted was unconstitutional and void, because it is in contravention of section one of article XIV of the amendments to the Constitution of the United States, in this:

1. It deprives the citizen of his property without due process of law.

2. It denies to the citizen the equal protection of the laws.

II. On the 11th day of February, 1896, the supreme court of the State of Utah affirmed the judgment of the district court, and decided that the ordinance in question was valid and not in contravention of the provisions of the Federal Constitution above referred to.

In this judgment of the supreme court of the State of Utah this plaintiff is by his counsel advised and verily believes, and therefore states, that error was committed to his great detriment and injury, which will more fully appear from the assignment of errors which is filed with this petition.

III. In the trial of this cause in the district court and also in the supreme court of the State of Utah there was drawn in question the validity of a statute of and an authority exercised under the State of Utah, on the ground of their being repugnant to the Constitution of the United States in the particulars above set forth and as appears more in detail in the assignment of errors filed herewith, and the decisions were in each instance in favor of their validity.

35 Wherefore this plaintiff prays—

That a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to this the Supreme Court of the United States.

Dated May 28th, 1897.

ROBERT G. WILSON,
Plaintiff in Error and Petitioner,
By J. W. N. WHITECOTTON,
His Attorney.

Attorney's address, Provo City, Utah.

36 In the Supreme Court of the United States.

In the Matter of the Petition of ROBERT G. WILSON for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Errors.

Comes now Robert G. Wilson, petitioner for a writ of error to the supreme court of the State of Utah, by J. W. N. Whitecotton, his attorney, and says that the said supreme court of the State of Utah in rendering its decision and judgment in this cause erred in the following particulars, to wit:

I. The said court erred in upholding the validity of the following ordinance of Eureka city, to wit: "No person shall move any building or frame of any building, into or upon any of the public streets, lots, or squares, of the city or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction subject the offender to a fine of not to exceed twenty-five dollars," for the reason:

1. That thereby the citizen is deprived of his property without due process of law.

2. The citizen is thereby denied the equal protection of the laws. This ordinance is therefore repugnant to section one of article XIV of amendments to the Constitution of the United States and therefore void.

37 II. The said court erred in affirming the judgment of the district court in said cause, for the reason that by the acts of the plaintiff herein, defendant there, complained of he did not violate any law, and said judgment is without any authority of law.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error, Provo City, Utah.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said cause, between Eureka City, a municipal corporation, and Robert G. Wilson, wherein was drawn in question the validity of a statute and ordinance of and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Robert G. Wilson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

39 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal United States District Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District Utah.

Allowed by—
C. S. ZANE,
Chief Justice Supreme Court State of Utah.

40 In the Supreme Court of the State of Utah.

ROBERT G. WILSON, Plaintiff in Error,
v.
EUREKA CITY, Defendant in Error.

Know all men by these presents that we, H. Bamberger, Alex. I. Wyatt, and E. W. Duncan, of the city of Salt Lake, county of Salt Lake, State of Utah, are held and firmly bound unto the above-named Eureka city in the sum of five hundred dollars, to be paid to the said Eureka city; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Robert G. Wilson has sued out a writ of error from the Supreme Court of the United States to the supreme court of the State of Utah to reverse the judgment of the said supreme court of the State of Utah in the above-entitled cause: Now, therefore, the condition os this obligation is such that if the above-named Robert G. Wilson shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

HERMAN BAMBERGER. [L. S.]
ALEX. I. WYATT. [L. S.]
E. W. DUNCAN. [L. S.]

Signed and delivered and taken and acknowledged this 3rd day of June, 1897, before me—
J. W. N. WHITECOTTON.

Approved:
C. S. ZANE,
Chief Justice Utah.

41 UNITED STATES OF AMERICA.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of Utah, in pursuance to a writ of error allowed in the case wherein R. G. Wilson is plaintiff in error and Eureka City is defendant in error, do return attached hereto a transcript of the record and proceedings, opinion, bond, together with the original citation, writ of error, and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, and bond is a full, true, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of the State of Utah this 14th day of July, 1897.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 16,637. Utah supreme court. Term No., 142. Robert G. Wilson, plaintiff in error, *vs.* Eureka City. Filed July 23d, 1897.